

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant: Arthur M. Krieg
Serial No.: 10/613,524
Confirmation No.: 4728
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For: NUCLEIC ACID COMPOSITIONS FOR STIMULATING IMMUNE
RESPONSES
Examiner: O. A. Ogunbiyi
Art Unit: 1645

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I hereby certify that this paper (along with any paper referred to as being attached or enclosed) is being transmitted via the Office electronic filing system in accordance with § 1.6(a)(4).

Dated: May 19, 2009

Signature: Nicole Millette Lapomardo/ (Nicole Millette Lapomardo)

Mail Stop Patent Ext.
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

REQUEST FOR RECONSIDERATION OF PATENT TERM ADJUSTMENT

Applicant respectfully requests reconsideration of the patent term adjustment (PTA) for U.S. Patent No. 7605138 issued on October 20, 2009, as indicated on the Decision on Request for Reconsideration of Patent Term Adjustment and Notice of Intent to Issue Certificate of Correction, dated April 19, 2010 (hereinafter, referred to as the “April 19, 2010 Decision”), and as indicated on the Decision on Request for Recalculation of Patent Term Adjustment in View of Wyeth and Notice of Intent to Issue Certificate of Correction, dated April 22, 2010 (hereinafter, referred to as the “April 22, 2010 Decision”). The April 19, 2010 Decision indicated that the PTA should be 1254 days. The April 22, 2010 Decision indicated that the PTA should be 1830 days. Applicant has considered both Decisions and considers the correct PTA to be 1308 days.

Applicant previously filed three requests for PTA reconsideration and/or recalculation for U.S. Patent No. 7605138. Those previous requests laid out all the facts underlying Applicant's proposed PTA. Here, Applicant sets forth the facts that support Applicant's request of additional PTA over and above that indicated on the April 19, 2010 Decision, as only the difference between these two PTA determinations is being contested by Applicant¹.

1. The difference between the PTA indicated on the April 19, 2010 Decision (1254 days) and Applicant's proposed PTA (1308 days) relates to the Patent Office's failure to issue U.S. Patent No. 7605138 within 4 months after the date on which the issue fee was paid. See 35 U.S.C. 154(b)(1)(A)(iv), 37 C.F.R. 1.702(a)(4) and 37 CFR §1.703(a)(6).

2. U.S. Patent No. 7605138 granted more than 4 months after payment of the issue fee. Applicant paid the issue fee on April 27 2009 and U.S. Patent 7605138 granted on October 20, 2009. This period of delay therefore began four months and a day after the issue fee was paid (i.e., August 28, 2009) and ended on the day U.S. Patent No. 7605138 granted (i.e., October 20, 2009), and totaled 54 days. See 37 CFR §1.703(a)(6) ("The number of days, if any, in the period beginning on the day after the date that is four months after the date the issue fee was paid and all outstanding requirements were satisfied and ending on the date a patent was issued.).

3. The delay set forth in paragraph 2 herein is considered "A" type delay (i.e., Guarantee of Prompt Patent And Trademark Office Responses as set forth in 35 U.S.C. 154(b)(1)(A).) The filing of a Request for Reconsideration (RCE) does not impact or reduce such "A" type delay. See 35 U.S.C. 154(b)(1)(B). Thus, while Applicant filed an RCE on October 30, 2008, such RCE does not negate the "A" type delay to which Applicant is entitled under 35 U.S.C. 154(b)(1)(A)(iv), 37 C.F.R. 1.702(a)(4) and 37 CFR §1.703(a)(6).

4. Applicant previously requested additional PTA based on the afore-mentioned delay under 35 U.S.C. 154(b)(1)(A)(iv), 37 C.F.R. 1.702(a)(4) and 37 CFR §1.703(a)(6) (see Request filed December 18, 2009), but the April 19, 2010 Decision in response to this Request did not consider or even comment on such delay.

¹ See paragraphs 9-10 regarding Applicant's request for reconsideration of the April 22, 2010 Decision.

5. The net USPTO delay of 1571 days is the sum of the three delay periods (941 days, 849 days, and 54 days) minus the number of days these periods overlap on the calendar (273 days). See *Wyeth v. Dudas*, 580 F. Supp. 2d at 138, 141 (D.D.C. 2008) (holding that the “only way that periods of time can ‘overlap’ is if they occur on the same day”). The period of overlap occurred from July 4, 2006 through April 2, 2007.

6. The apparent net Applicant delay of 263 days is the sum of the apparent Applicant delay periods (97 days, 92 days, 41 days, 53 days, and 74 days) minus the number of days these periods overlap on the calendar (94 days). The periods of overlap occurred from October 31, 2008 through December 10, 2008 and from October 31, 2008 through December 22, 2008.

7. Accordingly, the correct PTA is 1308 days which is the total period of USPTO delay (1571 days) minus the total period of Applicant delay (263 days).

8. A terminal disclaimer was not filed in U.S. Patent No. 7605138 and the patent is not subject to a terminal disclaimer.

9. As stated above, Applicant also received the April 22, 2010 Decision which accorded a PTA of 1830 days. Applicant requests reconsideration of the PTA indicated on the April 22, 2010 Decision also. Applicant’s representative (MaryDilys Anderson) discussed the basis of the additional PTA indicated on the April 22, 2010 Decision with Kery Fries in a phone call on May 3, 2010 and was notified that the increase in PTA was a result of two PTA determinations being conducted at the Patent Office, one of which was a computer-generated decision that failed to consider the various bases for delay. However, apart from the facts set forth above with respect to the April 19, 2010 Decision, Applicant can provide no further explanation for the difference between its proposed PTA (1308 days) and the April 22, 2010 Decision PTA (1830 days) because Applicant does not understand the methodology that resulted in this latter PTA nor does the April 22, 2010 Decision set forth such methodology.

10. Accordingly, Applicant is requesting reconsideration of the PTA indicated on the April 19, 2010 Decision and on the April 22, 2010 Decision. Based on the facts set forth above, Applicant submits that the correct PTA is 1308 days, and not the 1254 days set forth in the April 19, 2010 Decision and not the 1830 days set forth in the April 22, 2010 Decision.

11. This request is being submitted within one month or thirty days of the mailing date of both the April 19, 2010 Decision and the April 22, 2010 Decision. It is therefore considered to be timely filed.

Applicant submits \$200.00 as set forth in 37 CFR § 1.18(e). If there is any additional fee occasioned by this Request that is not covered by the enclosed fee, please charge any deficiency to Deposit Account No. 23/2825.

Respectfully submitted,

Date: May 19, 2010
x05.19.10

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